



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 12, 2002

Ms. Moira Parro
Assistant District Attorney
Dallas County
411 Elm Street, Suite 500
Dallas, Texas 75202-3384

OR2002-7073

Dear Ms. Parro:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173609.

The Dallas County District Attorney (the "county") received two requests for information related to RFP 2002-011-1007 and the resulting contract for IT Outsourcing. You represent to this office that the county notified "all interested third parties" whose proprietary interests may be implicated of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You raise no exception to disclosure on behalf of the county and make no arguments regarding the proprietary nature of the third parties' information.

¹The submitted documentation indicates that the third parties that were sent notice under section 552.305 are the following: ACS Enterprise Solutions, Inc., Schlumberger Omnes, Inc., Science Applications International Corporation, Xerox Connect, Inc., and Clearview Management Consultants, LLC. We were not provided a copy of any section 552.305 notice sent to Electronic Data Systems Corporation.

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code §552.305(d)(2)(B). As of the date of this ruling, we have not received any arguments from Electronic Data Systems Corporation ("EDS") or Xerox Connect, Inc. ("Xerox"). Except as otherwise noted below, we have no basis to conclude that the information of EDS or Xerox is excepted from disclosure. *See, e.g.,* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Clearview Management Consultants, LLC ("Clearview"); Science Applications International Corporation ("SAIC"); and Schlumberger Omnes, Inc. ("Schlumberger") each assert section 552.110 of the Government Code. SAIC also asserts section 552.101 of the Government Code. Clearview also asserts section 552.111 of the Government Code. Schlumberger also asserts section 552.104 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also considered submitted comments made on behalf of one of the requestors. Gov't Code §552.304.

We first note that SAIC and Clearview state that each company submitted its information to the county with a statement indicating that certain portions were to remain confidential. However, information that is subject to the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986). Consequently, the information at issue must fall within an exception to disclosure in order to be withheld.

SAIC makes identical arguments under sections 552.101 and 552.110 of the Government Code. Section 552.101 generally applies to "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes, and also encompasses the doctrines of common-law

and constitutional privacy. Because SAIC does not argue any specific law, other than section 552.110, we consider SAIC's arguments under section 552.110 and need not further address SAIC's section 552.101 assertion.

As already noted, Clearview asserts section 552.111 and Schlumberger asserts section 552.104 of the Government Code. However, we note that sections 552.104 and 552.111 are not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). Section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 (1993). The county has not raised either exception. Therefore, no portion of the submitted information of Clearview or Schlumberger may be withheld from disclosure pursuant to sections 552.104 or 552.111 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Section 552.110(a) applies to trade secrets. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the

business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See*

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Open Records Decision No. 661 (1999); *see also National Parks & Conservation Ass'n*, 498 F.2d at 770.

After reviewing the submitted information and the arguments set forth by SAIC, we conclude that SAIC has established that the release of some of the information at issue would result in substantial competitive harm to the company, and thus the marked portions of the submitted information must be withheld under section 552.110(b).³ The remainder of the SAIC proposal, for which SAIC makes no arguments, must be released to the requestor except as provided below.

Schlumberger contends that certain information contained in its proposal is "proprietary," and that other information is "commercial or financial information, the disclosure of which would cause substantial competitive harm" to Schlumberger. In this instance, Schlumberger does not address the six factors that are relevant to the question of whether a private party has made a *prima facie* case under section 757 of the Restatements. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). Nor does Schlumberger explain how the requested information meets the Restatement definition of a trade secret. We therefore conclude that Schlumberger has not demonstrated that any of the information in question constitutes a protected trade secret under section 552.110(a) of the Government Code. We further find that Schlumberger has failed to provide a specific factual or evidentiary showing that substantial competitive injury to Schlumberger would likely result from disclosure of the requested information. Thus, we conclude that Schlumberger has not adequately demonstrated that release of the information at issue would harm its competitive interests. Consequently, no portion of Schlumberger's proposal is excepted from disclosure under section 552.110.

After careful review of the arguments submitted by Clearview and the submitted information, we find that Clearview has established that most of its submitted information is excepted from public disclosure pursuant to section 552.110. However, we find that Clearview has not demonstrated that the Bidder Legend or the Bidder Evaluation Matrix Summary constitute a protected trade secret under section 552.110(a) of the Government Code. We further find that Clearview has failed to provide a specific factual or evidentiary showing that

³We note that the county submitted only SAIC's "Revised Offer Submission" dated April 1, 2002 to this office for review. While SAIC claims exceptions to the disclosure of its "Service Agreement Nos. 1-14" and its "best and final offer," the county did not submit this information to this office; therefore this ruling does not address that information.

substantial competitive injury to Clearview would likely result from disclosure of this information. Thus, we conclude that Clearview has not adequately demonstrated that release of the Bidder Legend or the Bidder Evaluation Matrix Summary would harm its competitive interests. Consequently, the Bidder Legend and the Bidder Evaluation Matrix Summary may not be withheld from public disclosure under section 552.110.

The submitted information contains e-mail addresses obtained from members of the public. Section 552.137 makes certain e-mail addresses confidential.⁴ Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The county must, therefore, withhold e-mail addresses of members of the public under section 552.137. We note, however, that section 552.137 does not apply to a government employee's work e-mail address, the general e-mail address of a business, nor to a web site or web page.

Finally, we note that some of the materials at issue are indicated to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

⁴The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

In summary, the county must withhold e-mail addresses of members of the public under section 552.137. With the exception of the Bidder Legend and the Bidder Evaluation Matrix Summary, the county must withhold Clearview's information under section 552.110. The marked portions of the submitted information of SAIC must be withheld under section 552.110(b). The remaining requested information must be released in accordance with federal copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

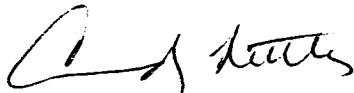
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 173609

Enc. Submitted documents

c: Mr. Peter C. Myers, Jr.
Senior Vice President and Group Counsel
ACS Enterprise Solutions, Inc.
2828 North Haskell
Dallas, Texas 75202
(w/o enclosures)

Ms. Moira Parro - Page 9

Mr. Robert J. Garrey
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202
(w/o enclosures)

Ms. Julie Skora
Client Representative-Public Sector/Govt.
IBM Corporation
1503 LBJ Freeway
Dallas, Texas 75234
(w/o enclosures)

Ms. Monica G. Bradshaw
Law Office of Monica G. Bradshaw
3700 Forum Drive, Box 136
Flower Mound, Texas 75028
(w/o enclosures)

Mr. Scott Trimble
Clearview Management Consultants, LLC
3110 Webb Avenue, Suite 201
Dallas, Texas 75205
(w/o enclosures)

Mr. Mark A. Rowland
Assistant General Counsel
Science Applications International Corporation
10260 Campus Point Drive
San Diego, California 92121-1578
(w/o enclosures)